FILE COPY

Supreme Court, U. S.
FILED
JUN 18 1938
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 130

INDIANAPOLIS BREWING COMPANY, INC.,
*Appellant,*

vs.

THE LIQUOR CONTROL COMMISSION OF THE STATE OF MICHIGAN ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN

# STATEMENT AS TO JURISDICTION.

HARRIS W. WILSNER,
HERBERT J. PATRICK,
THOMAS F. O'MARA,
*Counsel for Appellant.*

# INDEX.

## Subject Index.


| | Page |
|---|---|
| Statement as to jurisdiction | 1 |
| Statutes sustaining the jurisdiction | 2 |
| State statute the validity of which is involved | 2 |
| Date of decree and application for appeal | 5 |
| The nature of the case, rulings of the court and substantial questions involved | 5 |
| Cases sustaining jurisdiction | 14 |
| Consideration of case not foreclosed by *State of California* v. *Young's Market Co.*, 299 U. S. 59 | 14 |
| Exhibit "I"—Opinion of the District Court of the United States for the Eastern District of Michigan | 17 |
| Exhibit "II"—Amended motion to dismiss | 23 |
| Exhibit "III"—Paragraph H in Clause Eleven of plaintiff's amended and supplemental bill | 26 |


## Table of Cases Cited.


| | |
|---|---|
| *Bordens Co.* v. *Baldwin*, 295 U. S. 194 | 11 |
| *Brucker* v. *Fisher*, 49 F. (2d) 759 | 14 |
| *Oklahoma Gas & Elec. Co.* v. *Oklahoma Packing Co.*, 299 U. S. 386, 54 Sup. Ct. Rep. 732 | 14 |
| *State of California* v. *Young's Market Company*, 299 U. S. 59 | 14 |
| *Stratton* v. *St. Louis S. W. Railway Co.*, 292 U. S. 10, 51 Sup. Ct. Rep. 8, 75 L. Ed. 135 | 14 |


## Statutes Cited.


| | |
|---|---|
| Constitution of the United States, Article I, Section 8 | 6 |
| Constitution of the United States, Article IV, Section 2 | 6 |
| Constitution of the United States, 14th Amendment | 6, 8 |
| 21st Amendment | 8, 14 |
| Public Acts of the State of Michigan of the Extra Sessions of 1933-1934 (page 16), Act Number 8, Section 40, as amended by Public and Local Acts of the Legislature of the State of Michigan passed at the Regular Session of 1937 (page 509), Act Number 281 | 2, 3 |
| United States Code Annotated, Title 28, Section 380 (Section 266 of the Judicial Code, as amended) | 2 |

IN THE

# DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

**In Equity. No. 8259.**

INDIANAPOLIS BREWING COMPANY, INC., AN INDIANA CORPORATION,

*Plaintiff and Appellant,*

*vs.*

THE LIQUOR CONTROL COMMISSION OF THE STATE OF MICHIGAN, EDWARD W. McFARLAND, HALE G. KNIGHT, AND VEROLD F. GORMELY, INDIVIDUALLY AND AS MEMBERS OF THE LIQUOR CONTROL COMMISSION OF THE STATE OF MICHIGAN; FRANK MURPHY AND LEON D. CASE, INDIVIDUALLY AND AS MEMBERS EX-OFFICIO OF THE LIQUOR CONTROL COMMISSION OF THE STATE OF MICHIGAN; RAYMOND W. STARR, INDIVIDUALLY AND AS ATTORNEY GENERAL OF THE STATE OF MICHIGAN,

*Defendants and Appellees.*

## APPELLANT'S STATEMENT AS TO JURISDICTION.

*To the Honorable Judges of the Above Entitled District Court of the United States:*

Comes now the plaintiff, Indianapolis Brewing Company, Inc., and concurrently with the presentation of its petition

for the allowance of an appeal from the District Court of the United States for the Eastern District of Michigan, Southern Division, being a specially constituted Three-Judge Court under Title 28, Section 380 of the United States Code Annotated to the Supreme Court of the United States herewith and hereby presents this statement disclosing the basis upon which the Supreme Court of the United States has jurisdiction upon such appeal to review the order and decree from which said appeal is taken.

The above named plaintiff-appellant, in support of the jurisdiction of the Supreme Court of the United States to review on appeal the above entitled cause and the order of said Court denying the prayer of said plaintiff-appellant for an interlocutory injunction, and the final decree dismissing the said amended bill in said cause as amended and supplemented, and particularly disclosing the basis therefor, respectfully represents:

**A. Statutes Sustaining the Jurisdiction.**

That the statutory provision believed to sustain jurisdiction is Section 380 of Title 28 of the United States Code Annotated (Judicial Code, Section 266, as amended) and particularly the following clauses thereof, reading:

> "An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case."
>
> "* * * And a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

**B. State Statute, the Validity of Which is Involved.**

That the statute of the State of Michigan, the validity of which is involved, is known as Section 40 of Act Number 8 of the Public Acts of the State of Michigan of the Extra Ses-

sions of 1933-1934 (page 16), as amended by Act Number 281 of the Public and Local Acts of the Legislature of the State of Michigan passed at the Regular Session of 1937, page 509.

That the title to said Public Act No. 8 together with Section 40 thereof, both as amended by Act No. 281 above referred to in their said amended form, reads as follows:

"An act to create a liquor control commission for the control of the alcoholic beverage traffic within the state of Michigan, and to prescribe its powers, duties and limitations; to provide for the control of the alcoholic liquor traffic within the state of Michigan and the establishment of state liquor stores; to provide for the licensing and taxation thereof, and the disposition of the moneys received under this act; to provide for the enforcement and to prescribe penalties for violations of this act; to provide for the confiscation and disposition of property seized under the provisions of this act; to provide a referendum in certain cases; and to repeal certain acts and parts of acts, general, local and special, and certain ordinances and parts of ordinances,"

"SEC. 40. Beer; taxation and discrimination.—There shall be levied and collected by the Commission on all beer manufactured and/or sold in this state a tax at the rate of one dollar and twenty-five cents per barrel if sold in bulk, and in like ratio if sold in smaller quantities, the payment of which shall be evidenced by excise tax beer stamps, caps, lids, or crowns as prescribed by the Michigan liquor control commission, affixed to the barrel, keg, case, or other container, as the case may be by the brewer if manufactured outside this state, whichever shall be designated by the commission, before sale thereof within this state by said wholesaler; Provided, however, That the tax imposed by this act upon beer manufactured in or imported into this state shall be rebated to such manufacturer or wholesaler upon satisfactory proof being furnished to the commission by affidavit or otherwise, as the commission may deter-

mine, that such beer was shipped out of the state for sale and consumption outside the state of Michigan.

"For purposes of taxation a barrel shall be construed to contain thirty-one gallons.

"Any manufacturer duly licensed as aforesaid and who has been paid said license fee shall be exempt from payment of any tax imposed under the provisions of act number one hundred of the public acts of nineteen hundred thirty-one or amendments thereto, commonly known as the malt tax act, for all malt products taxed by said act used in its manufacturing process.

"The commission shall forthwith adopt a regulation designating the states, the laws, or the rules or regulations of which are found to require a licensed wholesaler of beer therein to pay an additional fee for the right to purchase, import, or sell beer manufactured in this state; or which deny the issuance of a license authorizing the importation of beer to any duly licensed wholesaler of beer therein who may make application for such license; or which prohibit licensed wholesalers of beer therein from possessing or selling beer purchased in this state, unless the one from whom purchased has secured a license and paid a fee therein, when such seller neither transports the beer into said state nor sells the same therein; or which impose any higher taxes or inspection fees upon beer manufactured in this state when transporting into or sold therein, than is imposed upon beer manufactured and sold within said state, the regulation adopted shall prohibit all licensees from purchasing, receiving, possessing, or selling any beer manufactured in any state therein designated, said regulation to become effective ninety days after its adoption. Any licensee or person adversely affected shall be entitled to review by certiorari to the proper court the question as to whether the commission has acted illegally or in excess of authority in making its findings with respect to any state."

There is also involved herein the validity of a certain regulation adopted under the authority of said amended Sec-

tion 40, set out above, by the Liquor Control Commission of the State of Michigan on December 14, 1937, and which regulation is now set out in its entirety, to wit:

> "Pursuant to Act No. 8, Public Acts, Extra Session of the year 1933 of the State of Michigan, as amended by Act No. 241 of the Public Act for the year 1935, and Act No. 281 of the Public Act for the year 1937, particularly Section 40 thereof, the Michigan Liquor Control Commission promulgates and adopts the following rule and regulation designating as discriminatory according to Section 40 of said Act the following States: MAINE, MARYLAND, NEVADA, INDIANA, NEW HAMPSHIRE, NORTH CAROLINA, PENNSYLVANIA, TENNESSEE, VERMONT, WASHINGTON. These designations are made after a careful examination of the laws and rules and regulations of the aforementioned states."

**C. Date of Decree and of Application for Appeal.**

That the date of the order of said Court denying the prayer of said plaintiff-appellant for an interlocutory injunction herein sought to be reviewed is the 5th day of March, 1938, and the date of the final decree of said Court dismissing plaintiff-appellant's bill of complaint as amended and supplemented, which order is also sought to be reviewed, is the 5th day of March, 1938, and that the date upon which the application for appeal herein is presented is the 27th day of April, 1938.

**D. The Nature of the Case, Rulings of the Court, and Substantial Questions Involved.**

a. The nature of the above entitled cause was a suit in which both a temporary injunction and a permanent injunction was prayed restraining the defendants as duly constituted officers of the State of Michigan, charged with the enforcement of the said Liquor Control Act of the State of Michigan, and also as individuals, from the enforcement

and execution of said amended Section 40, and also from the enforcement and execution of a certain regulation adopted under said amended Section 40 by said Commission on December 14, 1937, which regulation is set out above. This regulation so adopted prohibited all licensees of the State of Michigan, from purchasing, receiving, possessing or selling any beer manufactured in any of the States designated in said regulation, including beer manufactured in the State of Indiana wherein the beer of the plaintiff and of persons in plaintiff's class was manufactured and had been for several years manufactured. This suit sought to declare each and all of said provisions of said amended Section 40 and of the said regulation of the Liquor Control Commission of the State of Michigan void and of no effect as being contrary to and in violation of Section 8, Article I of the Constitution of the United States (The Commerce Clause), and contrary to and in violation of the Fourteenth Amendment of the Constitution of the United States, (as repugnant to both the Equal Protection and Due Process Clauses thereof), and also in violation of Section 2, Article IV of the Constitution of the United States (privileges and immunities of citizens).

Plaintiff's bill as amended and supplemented was brought both on behalf of the plaintiff, a manufacturer of beer whose plant was located in the State of Indiana and who was duly licensed under the laws of Michigan to import beer into and sell the same within the State of Michigan, and on behalf of other manufacturers within the State of Indiana similarly situated, and claimed that the rights and property interest of the plaintiff and of persons of said class were being injured and threatened with injury through the threatened enforcement of the said amended Section 40 of said Act No. 8 of the State of Michigan and the said regulation adopted pursuant thereto by the said Liquor Control Commission of the State of Michigan in violation of said provisions of

the Constitution and also in violation of the rights of their customers who were duly licensed wholesalers within the State of Michigan and which rights of the said licensed wholesalers, the customers of said plaintiff and of persons in plaintiff's class, were being injured and threatened with injury in violation of each of the said provisions of the Constitution of the United States above referred to.

b. The plaintiff more particularly contended in its bill of complaint as amended and supplemented in support of its claim, that said amended Section 40 and the regulation of the Liquor Control Commission of the State of Michigan, adopted December 14, 1937, were each in violation of the said provisions of the Federal Constitution in that;

aa. The classification of the manufacturers of beer whose product could be lawfully sold within the State of Michigan and the classification of manufacturers of beer whose product could not be sold within the State of Michigan, based solely on the kind of police statute in force in the several States of their respective domicile, was an unreasonable and arbitrary classification and was without public object.

bb. The State of Michigan exceeded any dispensation from the operation of the Commerce Clause or the Fourteenth Amendment accorded to it under the Twenty-first Amendment of the Constitution of the United States, inasmuch as the said Public Act and regulation thereunder permitted the free and uninterrupted flow of beer into Michigan from States producing far more beer and shipping far more beer into the State of Michigan than was shipped from the State of Indiana, or from any or all of the States designated as discriminatory in said regulation, and were not designed or adapted or reasonably related to the regulation or control of the alcoholic traffic into or within the State of Michigan but were intended and designed solely for the purpose of promoting in other States of the Union

the sale of beer produced within the State of Michigan by bringing economic pressure upon such other States to abandon the types of law declared discriminatory by said statute of the State of Michigan and which laws of said other States were designed purely for police purposes within the States of their enactment.

cc. The Twenty-first Amendment of the Constitution of the United States does not prevent the provisions of the Fourteenth Amendment and of the Commerce Clause from inhibiting the enactment by the State of Michigan of a law which has no reasonable relation or is not reasonably adapted to policing or controlling traffic into or within Michigan but which is designed and adapted solely to promoting the sale of beer produced in Michigan within the other States of the Union through the erection of a barrier intended exclusively for the pecuniary advantage of the manufacturers of beer located within Michigan.

dd. Said statute and regulation deny to the plaintiff and others similarly situated and also to their customers within the State of Michigan, the equal protection of the law.

ee. Said statute and regulation deny to the plaintiff and others similarly situated and to their customers within Michigan the right to carry on a lawful business recognized and made lawful by the State of Michigan.

ff. They take and destroy property rights of the plaintiff and of said other persons without just cause and reason and without just compensation.

gg. They arbitrarily and unreasonably infringe upon freedom of contract.

hh. They constitute class legislation enacted for the benefit of manufacturers of beer whose plants are located within the State of Michigan.

ii. They are arbitrary, discriminatory and unreasonable interference with interstate commerce.

jj. They have no relation to the public health, morals or welfare of the people of Michigan and are enacted for the avowed purpose of discriminating against manufacturers located in States which refuse to conform to the requirements of the State of Michigan in the enactment of their local police legislation.

kk. They violate in all said particulars and respects the rights of the licensed wholesalers in the State of Michigan who are customers of the plaintiff and of persons in plaintiff's class and with whom plaintiff and said other persons enjoy long established and valuable trade and good-will for the sale of beer manufactured in the State of Indiana.

c. Special findings and conclusions of law

On March 5, 1938, the District Court entered an order denying the petition of the plaintiff for special findings of facts and conclusions of law requested by him and reciting:

> "It appearing that there are no issues of fact presented since no answer has been filed and no evidence received, and since in our opinion heretofore filed we have made the general finding that we accept the facts as stated in the bill of complaint and amendments and the affidavits attached thereto, and have made therein such detailed findings as bear upon the legal and constitutional issues, and since our conclusions of law are with sufficient particularity set forth in the said opinion.
>
> "The petition for special findings of fact and conclusions of law is hereby denied."

The opinion of the court, which is copied *verbatim* in Exhibit I, attached hereto and made a part of this statement, recites in relation to the issues and facts as follows:

> "In conformity with law, a three judge court was specially convened to consider the petition for inter-

locutory injunction. No answer having been filed—the defendants moving to dismiss—we find the facts, so far as necessary to decision, as alleged in the bill and its accompanying affidavits.

"The plaintiff is engaged in the manufacture of beer in Indiana and its sale in interstate commerce. The defendants are residents and citizens of Michigan and public officers of that state charged with the duty of enforcing its liquor laws and proposing to do so. The plaintiff is a licensee of the Michigan Liquor Control Commission, qualified as an out-of-state manufacturer to ship beer into Michigan, and has built up a valuable business and good will for its product in that state. In July, 1937, the Michigan Legislature amended Section 40, of Act No. 8, of the Public Acts of the Extra Session of 1933 to provide that after its effective date the Liquor Control Commission should forthwith adopt a regulation designating the states, the laws, rules or regulations of which: (1) are found to require a licensed wholesaler of beer therein to pay an additional fee for the right to purchase, import, or sell beer manufactured in Michigan; or (2) which deny the issuance of a license authorizing the importation of beer to any duly licensed wholesaler of beer therein who may make application for such license; or (3) which prohibit licensed wholesalers of beer therein from possession or selling beer purchased in Michigan, unless the one from whom it is purchased has secured a license and paid a fee therein, when such seller neither transports the beer into said state nor sells the same therein; or (4) impose any higher taxes or inspection fees upon beer manufactured in Michigan when transported into or sold therein than is imposed upon beer manufactured and sold within said state, and that the regulation so adopted shall prohibit all licensees from purchasing, receiving, possessing, or selling, any beer manufactured in any state therein designated, such regulation to become effective ninety days after its adoption.

"Pursuant to the authority and direction of amended Section 40, the defendant Liquor Control Commission

on the 14th day of December, 1937, adopted a regulation as therein provided designating specific states, including Indiana, as discriminatory, and as a result the purchasing, receiving, possessing or selling of any beer manufactured in Indiana will become unlawful after the 14th day of March, 1938. The enforcement of this regulation will injure or destroy the business which the plaintiff has developed in Michigan. The discriminations against Michigan beer by the State of Indiana which led to the proscription of beer from that state by the regulation, are to be found in Sections 8, 9 and 41 of the Indiana Liquor Control Act of 1935. They require that licensed Indiana wholesalers in order to secure an import privilege pay an additional fee of $1500.00 and limit such permits to not more than 100. They require an additional bond for handling out-of-state beer of $10,000 and limit importation to beer which is the absolute property of the permittee."

The court thereupon ordered that the prayer of plaintiff for an interlocutory injunction be denied and "that a hearing upon the merits will add nothing to the applicable or presently conceded facts that relief, both temporary and permanent, is grounded solely upon asserted invalidity of the statute, and the case, unlike *Bordens Co.* v. *Baldwin*, 295 U. S. 194, not being one where evidence is likely to make answer to that question clear, the bill is dismissed with costs to the defendants."

Thus the court did not rule in terms upon the motion of the defendants to dismiss the bill, but that motion is, nevertheless, attached hereto and made a part hereof and marked Exhibit II.

The plaintiff's Bill of Complaint as amended and supplemented alleged in substance, that plaintiff was a corporation and a resident of the State of Indiana, and that all the defendants were residents of the State of Michigan, and as officers of that State were threatening to enforce said amended Section 40 of the above regulation adopted pur-

suant thereto by the Liquor Control Commission of Michigan on December 14, 1937, effective on March 14, 1938 against plaintiff and persons in the plaintiff's class, being all out-of-state manufacturers and shippers of beer into Michigan, domiciled in the states designated in said regulation, and also against their customers, the licensed wholesalers within Michigan with whom the plaintiff and persons in plaintiff's class had established and were enjoying a valuable trade and good will in the sale of their beer, and that plaintiff's good will and trade were of a value far in excess of Ten Thousand Dollars ($10,000.00); that the matter in controversy involved more than Three Thousand Dollars ($3,000.00) exclusive of interest and costs, and was wholly between citizens of different states and could be fully determined as between them.

By the enforcement of said act and regulation, the trade and good will of plaintiff and persons in plaintiff's class would be entirely destroyed and were being damaged by the threatened enforcement of said statute and regulation, which were in violation of Section 8, Article 1 (Commerce Clause) of the Federal Constitution, and the Fourteenth Amendment thereof (Due Process and Equal Production Clauses). The bill set out in detail the factual situation with reference to the importation of beer into Michigan, and also detailed statistics relating thereto. This portion of the Bill is set out in Exhibit III attached hereto and made a part hereof. The facts and statistics thus alleged were, as indicated in the quotation above set out, from the Court's opinion found to be true. Upon these facts and statistics so found, the plaintiff bases its contention that the statute and regulation thereunder were without bearing upon or in relation to the control of the importation of beer into or the traffic in beer within the State of Michigan.

(d) The District Court abused its discretion in refusing to grant plaintiff's prayer for an interlocutory injunction inasmuch as:

(aa) The facts were not in dispute. As shown by the special findings of fact the allegations of the plaintiff's amended bill were taken as true; and the said facts indisputably show that the statute and regulation made in pursuance thereof by the Liquor Commission of the State of Michigan was not intended or designed and was not apt to regulate or control the domestic traffic in beer within the State of Michigan and that beer would continue to be imported from States which were not designated in said regulation in far greater quantities than the amount of beer which would be excluded from the State of Indiana and that whatever exclusion of Indiana beer would occur by reason of said regulation, the place thereof would be taken by beer imported from the larger beer importing States and that consequently there was no injury or damage to the State of Michigan and no effect whatever upon the administration and enforcement of its liquor laws; that on the contrary even the threatened enforcement of said regulation sought to be enjoined was undoubtedly causing immediate and irreparable loss of the trade and good will of the plaintiff and persons in the plaintiff's class and the customers of said plaintiff, namely, the beer wholesalers and retailers who purchased the beer manufactured by the plaintiff within the State of Michigan; that the statute and regulation in question clearly exceeded the power of the Legislature of Michigan to enact by reason of the Commerce Clause and the Fourteenth Amendment, each of which were invoked by the said plaintiff, and clearly the said section of the Twenty-first Amendment does not extend any dispensation to a State to legislate for the sole purpose of promoting the

sale of its beer throughout other States by coercing such other States into modifying their police regulations governing the alcoholic traffic through threatened loss of a market for their own manufacturers.

### E. Cases Sustaining Jurisdiction.

Cases believed to sustain the jurisdiction of this appeal are as follows:

*Oklahoma Gas & Elec. Co.* v. *Oklahoma Packing Co.*, 299 U. S. 386, 390, 54 Sup. Ct. 732, 734;

*Stratton* v. *St. Louis S. W. Railway Co.*, 292 U. S. 10, 51 Sup. Ct. 8, 75 L. Ed. 135;

*Brucker* v. *Fisher* (6 C. C. A. Mich. 1931), 49 F. (2d) 759.

### F. Consideration of Case Not Foreclosed by State of California v. Young's Market Co., 299 U. S. 59.

The consideration of the questions involved in this appeal is not foreclosed by State Board of Equalization of the *State of California* v. *Young's Market Company*, 299 U. S. 59.

The classifications dealt with in the case just cited consisted of all manufacturers of beer located outside the State of California as one class and all manufacturers of beer located inside the State of California as another class. It was this classification and not a classification of the kind involved in the instant case that was held to be "recognized by the Twenty-first Amendment." For in the very next sentence in this decision the Court declared, "However, the classification and taxation made by California *rests on conditions requiring difference in treatment*" (our italics) (page 64). The decision just cited thus indicates the applicability in the proper case of the Commerce Clause and the Fourteenth Amendment.

The Court also declared on page 64:

> "The plaintiff insists that to sustain the exaction of the importer's license fee would involve a declaration that the Amendment has, in respect to liquor, freed the States from all restrictions upon the police power to be found in other provisions of the Constitution. The question for decision requires no such generalization."

The classification created by the Michigan statute here involved does not consist of the manufacturers of beer domiciled in Michigan as one class, and out of State manufacturers as another class. Instead the classification consists of the manufacturers of beer within Michigan as one class, the manufacturers of beer domiciled in States the laws of which are not denounced by amended section 40 of the Michigan Act as disqualifying the beer there made for admission into Michigan and sale therein as another class, and the manufacturers of beer domiciled in States the laws of which contain provisions which under the challenged Michigan Act disqualify the beer produced in such States from entry into Michigan as a third class. The basis for the classification lies, as among out of State manufacturers, in what provisions are contained in the laws of the States of the domicile of the manufacturer.

In other words the Michigan Act is purely of the retaliatory type and its application hinges entirely upon the laws of a sister State. The statute under consideration in *Board v. Young's Market Co., supra,* was not of the retaliatory type. The classification attempted by the Michigan Act is certainly not that recognized by the Twenty-first Amendment.

This case therefore presents an entirely novel question under the Constitution involving the construction of the

Commerce Clause and the Fourteenth Amendment in their relation to the second section of the Twenty-first Amendment.

HARRIS W. WIENNER,
HERBERT J. PATRICK,
THOMAS F. O'MARA,
*Attorneys and Solicitors*
*for Plaintiff-Appellant,*
*Indianapolis Brewing Co., Inc.*

## EXHIBIT 4.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

Equity No. 8269.

INDIANAPOLIS BREWING COMPANY, INC., an Indiana Corporation, *Plaintiff*,

*vs.*

THE LIQUOR CONTROL COMMISSION OF THE STATE OF MICHIGAN *et al.*, *Defendants*.

Before Simons, Circuit Judge, and Moinet and O'Brien, District Judges

SIMONS, *Circuit Judge*.

The plaintiff is a brewing corporation of the State of Indiana, and brings this suit by bill in equity against the members of the Michigan Liquor Control Commission, the Governor and Secretary of State as ex-officio members of the Commission, and the State's Attorney General, to restrain by temporary and permanent injunction the enforcement of certain provisions of the State Liquor Law on the ground that they are violative of both Federal and State Constitutions. In conformity with law, a three judge court was specially convened to consider the petition for interlocutory injunction. No answer having been filed—the defendants moving to dismiss—we find the facts, so far as necessary to decision, as alleged in the bill and its accompanying affidavits.

The plaintiff is engaged in the manufacture of beer in Indiana and its sale in interstate commerce. The defendants are residents and citizens of Michigan and public officers of that state charged with the duty of enforcing its liquor laws and proposing to do so. The plaintiff is a licensee of the Michigan Liquor Control Commission, qualified as an out-of-State manufacturer to ship beer into Michi-

gan, and has built up a valuable business and good will for its product in that state. In July, 1937, the Michigan Legislature amended Section 40, of Act No. 8, of the Public Acts of the Extra Session of 1933 to provide that after its effective date the Liquor Control Commission should forthwith adopt a regulation designating the states, the laws, rules or regulations of which: (1) are found to require a licensed wholesaler of beer therein to pay an additional fee for the right to purchase, import, or sell beer manufactured in Michigan; or (2) which deny the issuance of a license authorizing the importation of beer to any duly licensed wholesaler of beer therein who may make application for such license; or (3) which prohibit licensed wholesalers of beer therein from possession or selling beer purchased in Michigan, unless the one from whom it is purchased has secured a license and paid a fee therein, when such seller neither transports the beer into said state nor sells the same therein; or (4) impose any higher taxes or inspection fees upon beer manufactured in Michigan when transported into or sold therein than is imposed upon beer manufactured and sold within said state, and that the regulation so adopted shall prohibit all licensees from purchasing, receiving possessing or selling, any beer manufactured in any state therein designated, such regulation to become effective ninety days after its adoption.

Pursuant to the authority and direction of amended Section 40, the defendant Liquor Control Commission on the 14th day of December, 1937, adopted a regulation as therein provided designating specific states, including Indiana, as discriminatory, and as a result the purchasing, receiving, possessing or selling of any beer manufactured in Indiana will become unlawful after the 14th day of March, 1938. The enforcement of this regulation will injure or destroy the business which the plaintiff has developed in Michigan. The discriminations against Michigan beer by the State of Indiana which led to the proscription of beer from that state by the regulation, are to be found in Sections 8, 9 and 41 of the Indiana Liquor Control Act of 1935. They require that licensed Indiana wholesalers in order to secure an import privilege pay an additional fee of $1500.00, and limit such

permits to not more than 100. They require an additional bond for handling out-of-state beer of $10,000, and limit importation to beer which is the absolute property of the permittee.

While the bill assails validity in respect to numerous provisions of the Federal and State Constitutions, the issue, upon consideration of the decision in *State Board of Equalization* v. *Youngs Market Co. et al.*, 299 U. S. 51, followed and applied by a local three judge court in *Zukaitis et al.* v. *Fitzgerald et al.*, 18 Fed. Supp. 1000, has now been narrowed in argument and briefs to a considefation of the assailed statute in respect to invalidity under the "Equal Protection Clause" of the Fourteenth Amendment. This is the plaintiff's main reliance.

Conceding that under the Young's Market case a state may in the exercise of its police power, now freed by the Twenty-first Amendment from the restraint of the commerce clause, discriminate against out-of-state beer, or against persons importing or dealing in such beer and likewise conceding under compulsion of that decision that a classification which distinguishes in treatment as between local beer and out-of-state beer does not offend the equal protection clause, the plaintiff urges that a classification which differentiates the product of certain states from that of other states is wholly arbitrary and capricious, and void under the equal protection clause. There exists no reasonable basis, it says, for this difference of treatment, and the regulation has no relation to the exercise of the police power of the state in protecting the health, safety, morals and welfare of its people. Nor does it aid in policing the state's regulatory laws governing the manufacture and sale of beer. Its purpose, it contends, is purely retaliatory and economic, for Michigan has no concern with the laws of other States and no power to impose its will by economic restrictions or prohibitions upon the law making power of other states. Nor has it the power to enact statutes or adopt regulations the enforcement of which may be subject to the exercise of legislative power in another state.

We have carefully examined the contentions thus stated. That the scope of state police power, except as it may have

been restricted by constitutional grant of power to the Federal Government, is not limited by narrow connotations to be assigned to the historic phrase "the protection of the health, safety and morals of the people," would seem to be fairly clear upon consideration of many decisions. *L. S. and M. S. Railroad Co.* v. *Ohio*, 173 U. S. 285; *C. B. & Q. Railroad Co.* v. *Drainage Commission*, 200 U. S. 361, 592; *Mutual Loan Co.* v. *Martell*, 222 U. S. 225; *Barbier* v. *Connelly*, 113 U. S. 27; *Cox* v. *Texas*, 202 U. S. 446. Were there still doubt of the extent of such power as is sought to be exercised in the presently considered enactment it would, we think be received by the recent decision of the Supreme Court in the Louisiana Chain Store case (*Great Atlantic & Pacific Tea Co.* v. *Grosjean*, 301 U. S. 412), wherein it was thought to reach to the promotion of "fair competitive conditions and to the equalization of economic advantages," and where it was also thought not limited by the fact that "the evils requiring regulation arise solely from operations * * * in part the result of extrastate transactions."

It is true, of course, that arbitrary discriminations and classifications without reasonable basis, are repugnant to a system of constitutional limitations, and may offend against the letter of the equal protection clause. But courts will not lightly assume legislative arbitrariness and caprice, and will not "declare a legislative discrimination invalid unless, viewed in the light of facts made known or generally assumed, it is of such a character as to preclude the assumption that the classification rests upon some rational basis within the knowledge and experience of the legislators." No, "A statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it * * *", *Metropolitan Co.* v. *Brownell*, 294 U. S. 580.

That the discrimination of the statute here assailed and the regulation adopted in pursuance thereof are not directed specifically against the industries of Indiana or their customers in Michigan is clear, for nine other states are in the same classification, and it operates equally upon all. Let it be conceded that a classification, even though general in terms, may still be unreasonable and arbitrary, such is not

the case here. The long history of efforts by state and national governments to control and regulate the manufacture and sale of alcoholic beverages, culminating in the adoption of the prohibitory Eighteenth Amendment and its repeal by the Twenty-first Amendment, with the qualification incorporated therein, demonstrates beyond peradventure that the manufacture and sale of alcoholic liquors are peculiarly subject to abuse, and that the public interest requires their most careful supervision. To that end states generally limit the number of persons who may engage therein require licenses and bonds, and inquire into the character, reputation, and financial ability of permittees. Where the industry is legalized there is a vital state interest in the economic stability of those who are permitted to engage in it, to the end that the usually high taxes and license fees may be promptly paid and that difficult competitive conditions may not tempt them to sharp practice and law evasion. Strict numerical limitation upon manufacturers, wholesalers, and retailers, is sufficiently demonstrative. Michigan finding the markets of other states closed to its own industry while its own market is open to unlimited competition, is free to seek legislative correction of an unequal competitive condition within the limits of its power. It may not, of course, exercise extraterritorial power or control the legislatures of its sister states, but it is idle to deny it power to regulate its own industry and control its own market to the extent that its industries are elsewhere excluded, and to the extent that such exclusion threatens their economic stability, and it is not an unreasonable classification to discriminate against out-state products in respect to their source when the laws of the state of original create the evil sought to be remedied and the classification operates equally upon all who fall within its reach.

It is not sound challenge to this power to say that the Michigan Act will not effectuate the legislative purpose since the closing of its doors to beer of ten states will only bring a greater flow of beer into Michigan from the larger producing states of which Indiana is not one. The contention is based on speculation, but even if it rested upon fact it is still tenuous, for, "the Legislature is not required to

make meticulous adjustments in an effort to avoid incidental hardships. It is enough that the classification has reasonable relation to the differences * * *" *Atlantic & Pacific Tea Co.* v. *Grosjean, supra,* 424. Power is not to be denied merely because it might have been more wisely or more effectually exercised.

The plaintiff relies very largely for support to its assault upon the reasonableness of the classification upon the decision of a three-judge court in Minnesota in the case of *Joseph Triner Corp.* v. *Mahoney, State Control Commissioner,* 11 Fed. Supp. 145, decided originally before the announcement of the decision in the Young's Market case but thereafter to the same effect under the style *Triner Corp.* v. *Arundel,* 20 Fed. Supp. 1019. It is sufficient to say that the Triner case involved a classification wholly dissimilar to that here considered, that the Minnesota court found no reasonable basis for it, while for that here involved we do.

Notwithstanding an early concession that the validity of the regulation adopted by the Commission is not involved in this action except insofar as dependent upon the validity of the law authorizing it, the plaintiff makes belated effort to demonstrate that the Indiana Liquor Law does not substantially discriminate against out-state beer. We are not confronted, however, with choice of accepting one or two consistent positions, for neither the bill nor the amended bill allege infirmity in the regulation if the law be valid. Had such issue been raised it might have been met by the defense of adequate legal remedy under the provision contained in Section 40 that "Any licensee or person adversely affected shall be entitled to review by certiorari to the proper court the question as to whether the Commission had acted illegally or *in excess of authority in making its finding with respect to any state*". The question not being here, we do not, of course, decide it.

Our conclusion is that the assailed Michigan statute is constitutionally valid. There being no other ground upon which it is sought, the prayer for interlocutory injunction is denied. It appearing also that a hearing upon the merits will add nothing to applicable or presently conceded facts, that relief, both temporary and permanent, is grounded

solely upon asserted invalidity of the statute, and the case, unlike *Borden's Co.* v. *Baldwin*, 295 U. S. 194, not being one where evidence is reasonably likely to make answer to that question clearer.

The bill is dismissed, with costs to the defendants.

CHARLES C. SIMONS,
*Circuit Judge.*
EDWARD J. MOINET,
*District Judge.*
ERNEST A. O'BRIEN,
*District Judge, c/o C. C. S.*

February 3, 1938.

---

**EXHIBIT II.**

In Equity No. 8269.

Amended Motion to Dismiss:

"Come now the above named defendants, and each of them, and amend their Motion to Dismiss heretofore filed, and as further grounds and reasons for their Motion to Dismiss the Bill of Complaint, the Supplemental Bill of Complaint and the Amendments to the Bill of Complaint and Supplemental Bill of Complaint heretofore filed, state:

1. That said Bill of Complaint, Supplemental Bill of Complaint and the Amendments thereto fail to show that the plaintiff is entitled to the relief therein demanded or to any relief whatsoever, in that:

(a) Section 40 of Act No. 8 of Public Acts of the State of Michigan of 1937, as amended, was enacted by the Legislature of the State of Michigan pursuant to the authority and within the limits of the Twenty-first Amendment to the Constitution of the United States of America;

(b) That there is in force in the State of Indiana laws, rules and regulations which discriminate against beer manufactured within the State of Michigan in manner prohibited by said Section 40, in that the laws, rules and regulations in force in the State of Indiana require a licensed

wholesaler of beer within the State of Indiana, who has paid a license fee of One Thousand Dollars ($1,000.00) for such privilege, to secure an additional license called a "port of entry" permit, for which a further fee of Fifteen Hundred Dollars ($1500.00) is required to be paid for the privilege of importing into and selling within the State of Indiana beer manufactured in the State of Michigan;

(c) That said laws, rules and regulations now existing within the State of Indiana are further discriminatory in that they deny the issuance of such license authorizing the importation of beer manufactured within the State of Michigan to any duly licensed wholesaler of beer within the State of Indiana who may make application for such license, but, on the contrary, limit the issuance of such additional "port of entry" permits to not more than one hundred (100) thereby limiting the number of licensees who may purchase and import beer manufactured within the State of Michigan.

(d) That by reason of the existence of such laws and regulations within the State of Indiana, said State has been properly designated by the Liquor Control Commission of the State of Michigan as one in which discriminatory laws, rules and regulations exist.

2. That said Section 40 of the Michigan Liquor Control Act does not violate Section 8 of Article I of the Constitution of the United States for the reason that the Twenty-first Amendment to said Constitution abrogated the right to import free so far as intoxicating liquors were concerned.

3. That said Section 40 of the Liquor Control Act does not violate Section 10 of Article I of the Constitution of the United States for the reason that the prohibitions of said Section are only applicable to licensees purchasing, receiving, possessing or selling beer manufactured in any State designated by the Liquor Commission in a regulation, which State has been found to discriminate against beer manufactured within the State of Michigan, and that the revocation of the license of any person violating such regulation would not amount to an impairment of an obligation of a contract for the reason that a license to deal in intoxicating liquor is

but a mere personal privilege granted by the Legislature of a State and is subject to the terms and meaning of Section 10 of Article I of the Constitution of the United States.

4. That said Section 40 of the Michigan Liquor Control Act does not violate Section 2 of Article 4 of the Constitution of the United States for the reason that the plaintiff is a corporation, organized and existing under the laws of the State of Indiana, and is not a citizen entitled to claim the benefits of the Privileges and Immunities Clause.

5. That said Section 40 of the Michigan Liquor Control Act does not violate the Fourteenth Amendment to the Constitution of the United States for the following reasons:

(a) The plaintiff corporation is not a citizen of the United States whose privileges or immunities are abridged by said Act;

(b) The plaintiff corporation is not a person within the jurisdiction of the State of Michigan which is denied the equal protection of the laws for the reason that the Bill of Complaint shows that said plaintiff corporation is organized and existing under the laws of the State of Indiana; said Bill of Complaint fails to allege facts which would amount to "doing business' by said corporation within the State of Michigan or which would subject it to the service of process therein. Said Bill of Complaint further fails to show that it has complied with the requirements of Statute of the State of Michigan which are prerequisite to its right to do business therein as a foreign corporation or which would subject it to or bring it within the jurisdiction of the State of Michigan.

(c) That said Section 40 of the Michigan Liquor Control Act does not violate the Fourteenth Amendment or the Equal Protection of the law's provision thereof, in that the Twenty-first Amendment recognizes and permits a State to classify intoxicating liquor which is manufactured outside thereof in a manner other and different than the same kind of intoxicating liquors which are manufactured within said State, and such classification recognized by the Twenty-first Amendment is not forbidden by the Fourteenth.

6. That said Michigan Liquor Control Act and, particularly, Section 40 thereof, is not unconstitutional because of an unwarranted delegation of legislative power for the reason that said Section clearly defines and prescribes the conditions and circumstances under which said Section is made operative and nothing remains to be done by the Liquor Control Commission except to determine the fact as to whether the legislation or the rules or regulations of another State conform to the terms and conditions prescribed in said Section 40.

RAYMOND W. STARR,
*Attorney General;*
GEORGE H. HEIDEMAN,
*Assistant Attorney General;*
EDMUND E. SHEPHERD,
*Assistant Attorney General,*
*Attorneys for the Above Named Defendants.*

(The affidavit of John D. Shea verifying the foregoing Motion to Dismiss and the Exhibits A, B, and C referred to therein and containing only Section 8, 9, and 41 of the Indiana Alcoholic Beverage Act are omitted.)

---

## EXHIBIT III.

(Paragraph H in Clause Eleven of Plaintiff's Amended and Supplemented Bill.)

H. In the ten states designated by the said State Liquor Control Commission in their said regulation of December 14, 1937, the number of licensed breweries and the amount of beer by them produced during the fiscal year ending June 30, 1937, are now set out in the following table, to-wit:

| State. | Number of Breweries. | Barrels. |
|---|---|---|
| Indiana | 17 | 2,254,490 |
| Maryland | 12 | 1,338,893 |
| Nevada | 2 | 21,388 |

| State | Number of Breweries. | Barrels. |
|---|---|---|
| New Hampshire | 1 | 58,824 |
| North Carolina | 1 | 82,293 |
| Pennsylvania | 109 | 6,614,907 |
| Tennessee | 3 | 155,952 |
| Washington | 17 | 915,391 |
| Vermont | 0 | 0 |

That in the fiscal year ending June 30, 1937, beer was produced in respective states named below by the number of breweries and in the amounts now set out:

| State. | Number of Breweries. | Barrels. |
|---|---|---|
| Illinois | 62 | 4,059,423 |
| Kentucky | 7 | 986,039 |
| Missouri | 20 | 3,442,809 |
| New York | 69 | 9,230,725 |
| Ohio | 55 | 4,281,448 |
| Wisconsin | 86 | 6,448,420 |

That during the first nine calendar months in the calendar year 1937 there were in all 603,241 barrels of beer produced outside of and imported into the State of Michigan. During the first ten calendar months in the calendar year 1937 there were imported into the State of Michigan 145,250 barrels of beer produced in the State of Indiana. That substantially all of said 603,241 barrels of said beer imported into the State of Michigan during the said nine months excepting the portion imported from the State of Indiana, were produced and shipped from the states of Illinois, Missouri, Ohio and Wisconsin and substantially no part of said beer produced outside of the State of Michigan and imported into the State of Michigan for sale therein during the said period of nine months was produced or shipped from the states of Maryland, Nevada, New Hampshire, North Carolina, Pennsylvania, Tennessee, and Washington and none whatsoever from the State of Vermont. And that during the same period the amount of beer imported into the State of Michigan which was produced in other states of the Union than Michigan amounted to about twenty per cent of the total amount of beer consumed in

the State of Michigan. That in the four states of Illinois, Missouri, Ohio and Wisconsin, which, as above alleged, produced and imported into the State of Michigan in excess of two-thirds of the total amount of beer imported into the State of Michigan during said period, are located the number of breweries as above set out which are capable of producing and importing into the State of Michigan far more beer in addition to that already being imported into the State of Michigan therefrom than was produced in the State of Indiana and shipped into the State of Michigan.

That in the said regulation adopted by said Liquor Control Commission of the State of Michigan on December 14, 1937, the states of Illinois, Missouri, Ohio and Wisconsin are not designated as states having laws containing the provisions which require under said legislation of the State of Michigan the exclusion of beer produced therein.

That in fact the laws of the states which are not designated in the said regulations of the Liquor Control Commission of the State of Michigan do not contain provisions requiring the exclusion of beer produced therein under the said legislation of the State of Michigan.

That in truth and fact the type of liquor control statute described in said amended Section 40 herein complained of has no bearing or relation to the amount of beer produced in any of the said states and shipped into the State of Michigan and the fact whether or not laws of any of said states contain provisions which require or do not require the exclusion of beer produced therein under said Section 40 has no bearing upon or relation to the amount of beer produced therein and shipped into the State of Michigan and the said standards prescribed in said statute of the State of Michigan for the admission or exclusion of beer produced in other states according to the provisions of the laws of other states having no bearing or relation in fact to the amount of beer made in any state and shipped therefrom into the State of Michigan or any bearing or relation to the control of liquor traffic in the State of Michigan.